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GOVERNMENTAL REGULATION OF RATES UNDER THE FOURTEENTH AMENDMENT.

Among the numerous decisions which have been rendered by the Supreme Court of the United States in regard to the regulation of rates to be charged by public-service corporations, probably those recently rendered in the cases of *New York v. Consolidated Gas Company, N. Y. Law Journal,* Jan. 15, 1909; and *Knoxville v. Knoxville Water Company, N. Y. Law Journal,* Jan. 28, 1909; best evidence the care with which the Federal Court proceeds and the positive facts which they demand, prior to declaring the rates imposed by the legislature of the states as confiscatory under the Fourteenth Amendment. The points involved in both cases being very similar, it will only be necessary to examine the facts and decision of the case against the Consolidated Gas Company in New York, and apply them to the Knoxville Water Company case, in order fully to comprehend the situation. The legislature of New York during the year of 1905-1906, Chapt. 736 and 737, Laws of 1905, passed laws restraining corporations furnishing or selling illuminating gas in the city of New York from charging the city more than seventy-five cents, and consumers other than the city, more than eighty cents per one thousand cubic feet, also requiring them to have a specified illuminating power, a certain pressure at all distances from the place

of manufacture, and prescribing a heavy penalty for their breach. Soon after the statutes were passed the Consolidated Gas Company filed a bill to enjoin the enforcement of these acts on the ground that they were unconstitutional, because the rates fixed were so low as to be confiscatory, the penalties so oppressive as to be unconstitutional, and the proviso regulating pressure impossible of fulfillment under commercially possible conditions and therefore illegal. The preliminary injunction sought was granted, and it was on the constitutionalty of the above points, in an appeal from the Circuit Court to the Supreme Court for the prevention of the issuance of a perpetual injunction, that the Supreme Court held the provisions in regard to pressure and penalties as void on the alleged grounds; but that as the Gas Company had failed to sustain the burden cast upon it of showing, beyond a just or fair doubt, that the rates were confiscatory, within the Fourteenth Amendment of the Constitution of the United States, the bill would be dismissed without prejudice, for by actual operation under the statute, the company may be prevented from obtaining a fair return upon the actual value of the property at the time it is being used for the public, and it should then have another opportunity of seeking redress.

Ever since the case of *Munn v. Illinois,* 94 U. S. 113, was decided, it has not been disputed that the legislature of a state has the power to subject the rates to be charged by public-service corporations to govermental regulation. This can be done either by direct statutory enactment, by delegated authority to a municipal corporation as a political subdivision of the state, *Capital City Gas Company v. City of Des Moines, 72* Fed. 818; or by a commission created by the legislature for the purpose of regulating the rates in a manner which will conform to the peculiar circumstances existing in each county, city, or town, *San Diego Land & Township Co. v. Jaspar,* 189 U. S. 439. This power, although usually exercised by the enactment of a maximum rate to be charged by the corporation, must be reasonably exercised in good faith, and consistently with the scope and objects of the incorporation, consequently the rates cannot be imposed without reference to what is just and reasonable as between the public and the corporation, for a state cannot by its agencies or under the guise of regulation, bring about a destruction and confiscation of property. *Stanislaus County v. San Joaquin Company,* 192 U. S. 201. The rates should be regulated in such a way as to

enable the company to maintain its existence, to preserve the property invested from destruction, and to receive from the capital actually and *bona fide* invested in the plant, a remuneration or dividend corresponding in amount to the ruling of interest, which is usually six per cent.

These rates, whether imposed by the legislature or the commission, are all presumed to be *prima facie* reasonable, and are the law of the land and must be submitted to both by the corporation and the parties with whom it deals, until an appeal has been made to the judiciary by a bill in chancery to have them declared void for unreasonableness. *Chicago, M. & St. P. Ry. v. Minn.*, 134 U. S. 418, 456. Thus, the burden of proof is cast upon the party alleging them not reasonable, and the judiciary should not interfere with the rates established, unless they are so plainly and palpably unreasonable, as to make their enforcement equivalent to the taking of property without such compensation as under all circumstances is both just to the owner and to the public; or in other words, judicial interference should never occur, unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation, as to compel the court to say, that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use. Unless the plaintiff can show by a fair preponderance of proof that the rates so fixed are not reasonable and in fact so unreasonable as to justify the court in staying its operation, the decree must be for the defendant. *San Diego Land & Township Co. v. Jaspar*, 189 U. S. 439.

The courts are not authorized to revise or change the rates imposed by the legislature or the commission, or to determine what under all circumstances would be a fair or reasonable rate, but their power is merely to determine whether the rates so established are unreasonable and confiscatory and when this has been completed their jurisdiction ceases. At times it is very difficult to determine whether or not rates are confiscatory for there are so many factors, and the application of general principles so strongly differ, as the peculiar circumstances and conditions differ, that there is no special unfailing test or standard of measurement. *Capital City Gas Company v. Des Moines*, 72 Fed. 829. The basis of all calculations, however, as to the reasonableness of rates to be charged by a public-service corporation, such

as a railroad, turnpike, gas, or water company, must be the actual value of the property at the time it is being used for the public. *Smyth v. Ames,* 169 U. S. 466, 547; *San Diego Land Company v. National City,* 174 U. S. 739, 757. In ascertaining that value the courts take many things into consideration. In the above-mentioned companies, the value of the franchise, and the original cost of construction as compared with the present cost, are usually among the first considered. The original cost cannot be taken as representing the actual value, as the company may have made injudicious contracts, had poor engineering, or the materials may have had an unreasonably high cost. Nor can the cost of reproduction always be a fair measure of the present value of a plant which has been used for some years, as the constituent parts depreciate in value from year to year in a varying degree. Then the amount expended in permanent improvements, the amount and market value of its stocks and bonds, the probable earning capacity of the property under the particular rates which have been prescribed by statute, and the sum required to meet the operating expenses are taken into consideration and given such weight as may be just and proper in each case. *Smyth v. Ames,* 169 U. S. 466, 547; *City of Knoxville v. Knoxville Water Co., supra.*

Should the courts, after considering the various elements, find the rates confiscatory, they will be declared unconstitutional, for if the company has been deprived of its right of charging a reasonable rate for the use of its property in the absence of judicial investigation, it is deprived of its lawful use, and thus in substance and effect of the property itself without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, which declares that "no person shall be deprived of life, liberty, or property without due process of law,"—and in so far as it is thus deprived, while others are permitted to receive reasonable profits from their invested capital —the company is deprived of equal protection of the law. *Chicago, M. & St. P. Ry. v. Minn,* 134 U. S. 418, 458; *New Memphis Gas Light Company v. City of Memphis,* 72 Fed. 952.

In accord with these principles, the Supreme Court in *Ragan v. Farmers' Loan & Trust Co.,* 154 U. S. 362, where the property was worth more than its capitalization and the prescribed rates would not pay one-half the interest on the bonded debt, and in *Covington Turnpike Company v. Sandford,* 164 U. S. 578; where

the prescribed rates would not pay even the operating expenses, has declared rates unconstitutional where they were clearly confiscatory. But in cases such as *New York v. Consolidated Gas Company, supra;* and *Knoxville v. Knoxville Water Company, supra,* where the evidence was not clear and convincing and where the court had neither actual experience nor adequate proof by which to judge of the confiscatory nature of the rates, they are to be commended for the caution with which they proceeded before declaring the rates illegal. In both equity and justice the contested rates should be given an actual test prior to the final consideration of the question of the issuance of the permanent injunction, and the Supreme Court by refusing to sanction federal intervention without clear proof of unreasonableness is establishing a precedent which should encourage such a trial of the rate laws, prior to the attempt to have them declared unconstitutional.

MALICIOUS PROSECUTION.. CRIMINAL PROCEEDINGS DISMISSED ON ACCOUNT OF LAPSE OF TIME.

Is the dismissal of a criminal proceeding, obtained by the flight of the defendant from the jurisdiction of the court and remaining absent therefrom, for a sufficient period of time to enable him to procure the dismissal of said proceeding solely on account of lapse of time, such a termination of the action as will support a suit for malicious prosecution? This new and interesting question was decided in the negative by the New York Court of Appeals in the case of *Siegmund E. Halberstadt v. New York Life Insurance Company,* Vol. XL, *New York Law Journal,* No. 86.

The action was brought to recover damages for an alleged malicious prosecution for the crime of embezzlement, claimed to have been instituted in Mexico by an agent of the defendant company against the plaintiff. A warrant for the arrest of the plaintiff was issued by the Criminal Court of the City of Mexico, but it was never executed for the reason that plaintiff avoided arrest by leaving the country and remaining away until a dismissal of the proceeding was procured in accordance with the laws of Mexico, on account of mere lapse of time.

No cases were found which are directly in point and the argument of the plaintiff was founded chiefly on *dicta.* In the case of *Clark v. Cleveland,* 6 Hill 344, the court said: "I by no